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Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

BRIEF FOR RESPONDENT OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

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(3) The Circuit Court of Appeals did not hold the regulations of the Interstate Commerce Commission inadmissible where relevant; but only that they were not relevant to the issue in this case, and even if relevant, they were merely cumulative evidence of facts otherwise fully proven and their exclusion was not prejudicial 23-25

(4) Since the Circuit Court of Appeals did not intimate that the regulations would not be admissible where relevant to the issues involved, there is no conflict between it and any other circuit on that subject 25

(5) The issues involved are of no consequence to anyone but the widow, to whom the monetary recovery is a partial substitute for the destruction of her husband's earning capacity. A case more inappropriate for review by this Court on certiorari is hard to imagine. A decision by this Court could and would settle nothing but this case 25-26

TABLE OF CASES.

*Not yet officially reported.

IN THE

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October Term, 1944.

No. _____.

E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, - - - - - - - *Respondent.*

BRIEF FOR RESPONDENT OPPOSING THE PETITION FOR A WRIT OF CERTIORARI.

The Respondent opposes the petition for a writ of certiorari for two reasons:

(1) The case involves only the question of whether, *under the law of Kentucky,* the evidence of Petitioner's negligence was sufficient to justify the submission of the case to the jury.

That is not a proper question for review by this Court on certiorari. A decision of that question by this Court would settle nothing but this case; and it would be wrong to deny a review to any litigant disappointed by a circuit court of appeals decision if

Petitioner were granted review in this simple negligence case.

(2) The decisions of the courts below were right, as is evidenced by the opinion of the District Court (R. 18), and of the Circuit Court of Appeals for the Sixth Circuit (R. 249), 146 F. 2d 765.

THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY CERTIORARI.

Rarely, we suppose, has this Court been burdened with a petition for a writ of certiorari in a case so inappropriate for the exercise of its discretionary jurisdiction. No Federal question is involved. There is no pretense that there is any conflict in the decisions of circuit courts of appeal in their interpretation of the negligence law of Kentucky. Certainly there is no pretense that anything but the negligence law of Kentucky could be involved. The decision of this Court could not produce uniformity of decision on any question.

Under *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it is recognized that there will be no uniformity in the decisions of the State courts on negligence law; and that conflict amongst circuits in interpreting State law do not justify review on certiorari. The language of this Court in *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 82 L. Ed. 1290, is apposite:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict

may be merely corollary to a permissible difference of opinion in the state courts."

The petition herein complains, as the Petitioner complained both to the District Court and to the Circuit Court of Appeals, both originally and on successive petitions for rehearing:

(1) That the evidence was not sufficient to justify the submission to the jury of the question of Petitioner's negligence, or if that contention be not sustained, then that the evidence demonstrated that the alleged intervening negligence of Jones-Dabney Company, the employer of Respondent's decedent, broke the chain of causation and absolved Petitioner from responsibility for the ensuing death.

(2) That the trial court erred in excluding evidence concerning regulations of the Interstate Commerce Commission. The evidence was excluded not because such regulations are inadmissible if relevant, but because *such evidence lacked relevancy to the issues involved in this case.* Furthermore, as the Circuit Court of Appeals clearly pointed out, *the facts sought to be elicited were actually brought before the jury* and if there were error in excluding the regulations it was non-prejudicial (R. 254). The evidence rejected was, at most, cumulative.

We repeat, that it must be rare that a case is presented to this Court that is so inappropriate for the exercise of this Court's discretionary jurisdiction.

Having been heard only some six times in the courts below, counsel want to be heard again, as if on appeal, in this Court on the same matters.

Magnum Import Co. v. *De Spoturno Coty,* 262 U. S. 159, 67 L. Ed. 922:

> ". . . The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. . . "

Obviously, Petitioner belongs to the 80 per cent group.

COMMENTS ON PETITIONER'S SUMMARY STATEMENT OF FACTS.

The facts are simple and may be best comprehended from reading the opinion of the District Court (R. 18) and of the Circuit Court of Appeals (R. 249), 146 F. 2d 765.

Lest a somewhat distorted view of the facts be obtained from the petition for certiorari, we submit the following comments on the statements contained in the petition, and supplement that statement in certain respects.

The petition for certiorari, as did the briefs and successive petitions for rehearing below, states, with

somewhat wearisome repetition, that no other lacquer manufacturer ever slid a drum of nitro-cellulose down a concrete ramp or chute. Technically the statement is accurate but, as will presently appear, the fact is of no significance since many other lacquer manufacturers skidded drums of nitro-cellulose about concrete floors, and no witness testifies that the danger of skidding on an inclined surface differs particularly from the dangers of skidding on a flat surface.

It is erroneously stated (p. 3) that the order in question was placed by wire. While it is of no significance, the fact is that the regular printed and typewritten order form was used (R. 195), and the supposed emergency which counsel mention as justifying the use of the dangerous drum that caused the death, in fact had no existence.

It is argued (p. 7) that when the Court withdrew from its original opinion the statement that it was the "general" practice of lacquer manufacturers in Louisville to skid drums over rough concrete; and the "implication," if any, that it was the "general practice" to skid such drums down a rough concrete ramp; and the "implication" that the Interstate Commerce regulations permitted the use of the black iron drum only in the export trade, no basis was left for the conclusion that the duPont Company could have anticipated an accident from the use of these drums. The Circuit Court of Appeals answered that contention (R. 257):

> "Notwithstanding these amendments to the opinion we adhere to the view that when the appellant for the first time shipped nitro-cellulose to the

> Jones Dabney Company in the lighter form of container, its failure to notify its consignee that such containers could not be safely handled in the manner in which it was accustomed to handle the earlier galvanized drums, raised issues properly submitted to the jury as to whether such failure of notice constituted negligence, and whether, if so, such negligence was the proximate cause of the injury; . . ."

It is clear, we think, that the Court withdrew those observations in somewhat broader terms than was required by the facts. Doubtless it was moved to that action by the fact that the withdrawal, in whatever terms, left its decision unimpaired. Possibly it felt that so broad a concession about an immaterial matter might bring the case to an end and avoid further insistence by Petitioner on minutiae and precision of expression that are more characteristic of a description of metes and bounds in a deed than of proceedings in a jury trial. If the Court had any such thought in mind its purpose failed.

The handling of this particular drum conformed to the practice which witnesses stated was usual and customary in lacquer manufacturing plants in Louisville and elsewhere; that the skidding of drums of nitro-cellulose over concrete is essential in the operation of lacquer plants, and that the practice in this particular instance did not vary from that followed in plants generally; though it is true that other lacquer manufacturers testified it was not customary in their plants to skid drums of nitro-cellulose over concrete

and so the word "all" in the Court's opinion was inadvertent and was withdrawn. The following conclusions, however, are amply supported by the testimony:

(1) No nitro-cellulose had ever been delivered in the sort of drum used in this case to any one in Louisville prior to the shipment in question. Witnesses for both sides agree to this: Murphy (R. 46), Burnett (R. 69), Kleier (R. 76-77), Evans (R. 83), Mitchell (R. 89), Milletti (R. 161), and Janssen (R. 163).

(2) No such drum had ever been used for the delivery of nitro-cellulose to any consignee in the United States, except the duPont Company made such use, though it does not appear to whom such deliveries were made. Nor did any witness from any single lacquer manufacturing company in the whole United States testify it had ever received such a drum (Callahan, R. 145; Crum, R. 142).

(3) That the light-weight drum was more susceptible to rupture than the standard drum, its top and fittings were less substantial and well made, and it would spark, while the galvanized drum would not (R. 47-100-105).

(4) There was competent and persuasive testimony that in the operation of lacquer plants drums of nitro-cellulose are customarily, though not invariably, skidded out of cars on metal rails and are customarily skidded about concrete floors in the plants. Various employees of the Jones-Dabney Company's plant testified that such practice prevailed in their plant for 19 years and in such other plants as they had had occasion to visit, and that it is not practicable to operate a

lacquer plant without skidding these drums about the concrete (R. 47, 48, 66, 80, 84, 90).

Mr. Burnett, a graduate chemist (R. 67), who has worked for lacquer manufacturers in Toledo and Buffalo and who has worked in various capacities for the Reliance Varnish Company in Louisville, Kentucky, in which plant he has had charge of lacquer manufacturing, in response to a question about the use of the black iron drum for the shipment of nitrocellulose, said (R. 69): "I have never seen it shipped in that type of drum."

He testified that he had been in numbers of other lacquer manufacturing plants, in addition to the three in which he had worked and had this to say concerning the practice of skidding drums (page 70 of the Record):

> "Q. Mr. Burnett, state whether or not in the operation of a lacquer plant, in the usual and customary way such plants are operated, drums of nitro-cellulose are customarily skidded about concrete floors.
>
> A. *They have been—always have been in any of the plants I have been in.*
>
> Q. In your opinion, is it practical or feasible to do otherwise?
>
> A. *In my opinion, I do not see how it is possible to do otherwise.*"

R., p. 72:

> "Q. And you mean to say, Mr. Burnett, that in all three of those plants, it is the common custom to skid steel drums full of nitro-cellulose down concrete ramps?

A. No, I didn't say that. I said—I answered his question that I had seen them skidded across concrete, not down concrete ramps but concrete floors. *I have seen them skidded across concrete floors day in and day out. I didn't say a concrete ramp.* I don't know whether there is any particular difference or not.

Q. Are you talking now about skidding end first or rolling?

A. I am talking about just giving a shove right across the floor, like that.

Q. *Do you mean to say that was common practice in these businesses?*

A. *Yes, that's common practice at our plant.*

Q. *Today?*

A. *Yes.*

Q. Why do you skid rather than roll them?

A. Well, when they unload these drums, either before or after, if the drum is standing fairly close to the chute where they unload it, I mean where they empty the contents of the drum, they will just give it a shove over there. If it is any distance, they will roll it.

Q. You are familiar with the fact that steel brought in violent contact with concrete or other steel, or any such hard substance, is apt to give off sparks, isn't it?

A. Yes.

Q. Don't you consider it rather dangerous procedure to skid drums of this rather highly inflammable material on concrete so as to subject it to the danger of sparks?

A. We didn't consider it so, no.

Q. Well, it is, as a matter of fact, isn't it?

A. You are talking about steel drums or galvanized?

Q. These drums.

The Court: The witness hasn't had any experience with but one type, has he?

Mr. Conner: No.

A. We never considered it dangerous to skid those across concrete. We may have been wrong. We never considered it dangerous, skidding galvanized drums across concrete."

R., p. 74:

"Q. I am simply asking you if from your experience with the companies for whom you worked whether it is perfectly safe and careful procedure to slide a drum full—a steel or galvanized or painted iron drum full of highly inflammable liquid like nitro-cellulose down a rough concrete ramp such as that shown in the picture which I hand you.

A. Right or wrong, we have always gone on the assumption that it was a safe practice with a galvanized drum. I certainly would object to doing it with a steel drum, that is, from what experience I have had.

Q. I believe I understood you to say awhile ago you never slid them down concrete ramps. You slid them for short distances on level surfaces.

A. We don't happen to have a concrete ramp ourselves.

Q. In your opinion then, would it or not be a safe and careful procedure to slide drums of either character, galvanized or painted, down a rough concrete ramp full of highly inflammable material like nitro-cellulose?

A. Well, in my opinion, I believe it would be fairly safe practice to slide a galvanized drum

down there. I may be wrong in it, but from what experience we have had it would indicate to me that it would be fairly safe to slide a galvanized drum down a concrete ramp, even though it is filled with inflammable liquid, as long as it is not full of explosives—as long as—you are speaking of nitro-cellulose?"

UNDER THE LAW OF KENTUCKY THE QUESTION OF PROXIMATE CAUSE WAS FOR THE JURY.

It seems clear from the above evidence that there is no difference between skidding a drum over a concrete floor, a flat concrete surface, and skidding it over a concrete chute, an inclined concrete surface. At any rate, there is no evidence that there is any such difference, and we assume it not to be a function of this Court to draw an inference to the contrary. That is the jury's function. The fact is, of course, that the drum which Petitioner substituted for the standard drum in this instance, after many years of use of the standard drum, involves vastly increased hazards, since it is susceptible to leaks and to spark, neither of which occurs with the standard drum. These increased hazards required notice of the change and it is frivolous to argue that Petitioner could not be responsible unless it knew of or anticipated the exact hazards that the use of this flimsy drum involved in this particular case.

It is argued that Jones-Dabney Company saw the drums were different and nevertheless used them. From this it is contended that notice of the increased hazards

would have been ineffectual. Again we submit that this Court is asked to draw inferences which it is the function of the jury to draw.

The facts are that, having no notice of the drastic departure from the practice invariably followed by duPont Company and all other manufacturers in shipping nitro-cellulose to Louisville, no executive or person expert in such matters was sent to inspect this particular car. The foreman of the crew of workmen who started unloading these drums saw that they were different from any he had ever handled before, but he knew that duPont "handled very highly explosive materials of all types"; and he assumed that duPont knew that "it was all right to send it in those kind of drums" (R. 63).

Will this Court assume that had duPont given proper notice of its intended use of the inferior drums, Jones-Dabney would not have taken required precautions? Surely that is a question for the jury. Surely, also, the negligence of this crew of workmen, if it was negligence, was not so unexpected a development that duPont Company might not reasonably have foreseen such negligence. It will be borne in mind that the testimony above quoted shows that the customary handling by Jones-Dabney of the standard drums was a safe practice and it only became dangerous because of the substitution of the inferior drum (R. 74-75). For nineteen years standard drums were skidded down this very chute without incident. The very first flimsy drum that was sent down exploded (R. 48). The necessity of answering this argument in this Court em-

phasizes anew the utter inappropriateness of a review by this Court of the fact situation in such an ordinary negligence case.

The law is well settled in Kentucky that it is for the jury to say, under such circumstances, whether the negligence of the original actor is the proximate cause of the injury, even though there was intervening negligence of a third party.

Miles v. *Southeastern Motor Truck Lines, Inc.*, 173 S. W. 2d 990, 295 Ky. 156, Oct. 5, 1943.

Plaintiff's truck was caused to collide with defendant's automobile, by reason of defendant's negligence. Gasoline was spilled on the road and a fire was caused by "the act of the unknown smoker in carelessly throwing his lighted tobacco or match on the highway."

The Court held that the jury was justified in finding that the original negligence causing the collision was defendant's negligence; that the act of the unknown smoker was an intervening cause; but not a superseding cause, and defendant was liable.

> " 'The lighting of the match by Duerr having resulted in the explosion, the question is, was that act merely a contributing cause, or the efficient and, therefore, proximate cause of appellant's injuries? *The question of proximate cause is a question for the jury.* In holding that Duerr in lighting or throwing the match acted maliciously or with intent to cause the explosion, the trial court invaded the province of the jury. There was, it is true, evidence tending to prove that the

act was wanton or malicious, but also evidence conducing to prove that it was inadvertently *or negligently done by Duerr.* It was therefore for the jury and not the court to determine from all the evidence whether the lighting of the match was done by Duerr inadvertently or negligently, or whether it was a wanton and malicious act. As said in Milwaukee (& St. P.) R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; "The *true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or legal knowledge.* It is to be determined as a fact in view of the circumstances of fact attending it." ' Snydor v. Arnold, 122 Ky. 557, 92 S. W. 289, 28 Ky. Law Rep. (1250), 1252. . . ."

Continuing its discussion on the same subject, the Court said:

". . . In Thompson on Negligence, No. 161, it is said: 'On principle, the rule must be here, as *in other cases, that, before the judge can take the question away from the jury and determine it himself, the facts must not only be undisputed, but the inference to be drawn from those facts must be such that fairminded men ought not to differ about them.* It must be concluded that this is so, when it is considered that proximate cause is a cause which would probably, according to the experience of mankind, lead to the event which happened, and that remote cause is a cause which would not, according to such experience, lead to such an event. *Now, whether a given cause will probably lead to a given result is plainly to be determined by the average experience of mankind;*

that is, by a jury rather than by a legal scholar on the bench.' . . ."

Later in its opinion, we find this language:

"It is also a principle well settled that when an injury is caused by two causes concurring to produce the result, for one of which the defendant is responsible, and not for the other, the defendant cannot escape responsibility. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence.' Black's Law & Practice, No. 21; Thompson on Negligence, Nos. 47-52; Whitaker's Smith on Negligence, 27; 29 Cyc. 488-502."

Of course, it is true that the exact act of the third person, Jones-Dabney Company, and the exact nature of the occurrence that did take place need not have been foreseen or foreseeable. The Court, in the Miles case, put it thus:

". . . 'The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted and hence is not liable therefor. 29 Cyc. 501-512 Sofield v. Sommers, 22 Fed. Cas., page 769, No. 13,157, 9 Ben. 526; Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300, 88 Am. St. Rep. 25.' "

Kentucky Independent Oil Company v. *Schnitzler*, 208 Ky. 507, 271 S. W. 570, involved the liability of an oil company to the consumer of oil who had purchased same from a merchant, who had in turn purchased the oil from the oil company. Both the oil company and the merchant were made parties defendant, and it was alleged that the oil company was negligent in permitting gasoline to be in the oil and that the merchant knew about it and was negligent in selling the oil with that knowledge. Nevertheless the Court of Appeals said:

> "As above stated, liability in a case of this character does not rest in contract or deceit, in which state of case, as we have seen, the knowledge of the middleman of the defect releases the manufacturer from liability to the ultimate consumer. Liability here rests on the duty owed by the manufacturer to the class of persons likely to be injured by his failure to exercise ordinary care in his activities, where danger to them will probably result from such failure.
>
> "(3) *Hence the negligence or knowledge of Burnside can have no effect to absolve appellant from liability to the ultimate consumer,* except in so far as such negligence or knowledge breaks the chain of causation, if it does. The problem thus presented for solution is the old problem of proximate cause in actions of tort."

Later in that opinion is this language:

> "(4) That the appellant set in motion forces which ultimately resulted in damage to appellee's decedent of a kind that the law will notice and

give redress for must be conceded. Does the fact that a second human actor, not acting in concert with a first human actor, intervenes with a tortious act which begins later in time to a tortious act of the first actor, and which second tortious act is the only force in active motion at the time of the damage, exonerate the first actor from liability? Although the second human actor may be liable, it does not necessarily follow that the first is exonerated. By the decided weight of authority, the first will be liable, if he foresaw or ought to have foreseen the commission of the second's tort. Although the earlier view was that the prior tort-feasor was never liable where a later tort-feasor intervened (see Vicars v. Wilcocks, 8 East. 1 (1806)), yet it has gradually come to be admitted that the earlier tort-feasor is liable in cases where the commission of the subsequent unlawful or tortious act and the happening of the damages ought to have been foreseen by him as not unlikely to follow" . .

And the subject is concluded thus:

"(6,7) Hence the court did not err in overruling appellant's demurrer to appellee's petition; and, as Burnside's ignorance or knowledge of the presence of the mixture and his negligent act in its resale, if it was negligent, were absolutely immaterial so far as appellant's liability in this case is concerned, it follows that the allegation in the petition of Burnside's negligence in the resale of the mixture was an immaterial allegation and hence surplusage, which neither adds nor detracts anything from the pleading . . ."

The District Court dealt with the same matter (R. 22), and the Circuit Court of Appeals (R. 252) thus correctly stated the principle:

> ". . . We arrived at the conclusion that while the fact that injury is the natural consequence of negligence, may not of itself be sufficient upon which to base liability, yet where the injury could reasonably have been foreseen in the light of attending circumstances liability follows, *and it is not necessary that the alleged negligent actor should have foreseen the precise manner in which the injurious result was brought about, if a generally injurious result should have been foreseen as reasonably probable.* . .
>
> ". . . We thought the true rule to be that when the thing done produces immediate danger of injury *and is a substantial factor in bringing it about, it is not necessary that the author of it should have had in mind the particular means by which the potential force he has created might be vitalized into injury.* The cases cited supported the conclusion, as does the American Law Institute, Restatement of Torts, Sec. 435, and Shearman & Redfield on Negligence, Sec. 39. Kentucky law is likewise in accord. *Kentucky Independent Oil Co.* v. *Schnitzler,* 208 Ky. 507; *Miles* v. *Southeastern Motor Truck Lines,* 295 Ky. 156; *Watson* v. *Kentucky & Ind. Bridge and R. Co.,* 137 Ky. 619; *Whiteman-McNamara Tobacco Co.* v. *Warren,* 23 Ky. L. R. 2120."

THE ALLEGED "REASONS FOR GRANTING THE WRIT" ARE NOT SUFFICIENT.

On page 16 of the petition for certiorari the Petitioner undertakes to state the reasons why the Court should grant the writ. Curiously enough, we do not find a reference to Rule 38, which outlines the circumstances under which this Court will ordinarily grant a writ of certiorari.

We have already noted that the case wholly lacks any of the criteria referred to in that rule, or in any of the decided cases with which we have any familiarity.

An analysis of the alleged "reasons for granting the writ" will quickly demonstrate that there are no such reasons.

(1) Reference is made to *Brady* v. *Southern Railway Co.*, 320 U. S. 476. It is said that the standards of foreseeability laid down in that case were not met in this case. We submit:

(a) That the case at bar is ruled by the law of Kentucky, and if it were true that the facts in this case did not meet the requirements of the rule, as laid down in that case, that would furnish no ground for a review on certiorari, or even for a reversal on the merits if the case were properly here. The *Brady* case involved a suit under the Federal Employers Liability Act, and from that opinion we quote the following significant sentences:

> ". . . In Employers' Liability Cases, this question must be determined by this Court finally.

> Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* . . .
>
> ". . . But when a state's jury system requires the court to determine the sufficiency of the evidence to support a *finding of a federal right to recover, the correctness of its ruling is a federal question.* . .
>
> ". . . An examination of the proven facts to determine whether they are sufficient to permit a verdict by the jury for the decedent's estate based upon reason is of no doctrinal importance. Every case varies."

The language is particularly apt here. Petitioner argues with much vigor and repetition that no such accident as occurred in this case had ever occurred before; and we submit that that was due to the fact that no such container had ever been shipped to any Louisville lacquer manufacturer, or to a lacquer manufacturer elsewhere, by any other nitro-cellulose manufacturer except duPont.

What would be established by a decision of this Court adverse to Respondent? This Court is not prepared, we assume, to require the Kentucky courts to adopt different rules of negligence law. If attempted, the task could not be accomplished because "every case varies." What was said in the *Ruhlin* case, *supra*, page 2, to the effect that conflicts between circuits furnish no basis for certiorari when the matter is con-

trolled by State law is equally applicable here. Since "every case varies," nothing that this Court could say as to the formula that the Kentucky courts should follow in negligence cases could possibly control the next case that arises in Kentucky wherein the facts would necessarily be different.

(b) If it were necessary that the Court of Appeals of Kentucky apply the same principles of negligence law that this Court applies, there would be no occasion to review the case at bar, since the facts in the *Brady* case are so widely divergent from the facts in the case at bar that nothing therein stated or decided could have the slightest bearing on the determination of this case. In fact, there is no conflict between the principles of negligence law applied by this Court and those applied by the Kentucky courts.

That case involved a switching accident where some unknown person improperly set a derailer, and this Court found "it is mere speculation as to whether that negligence is chargeable to the decedent or another."

If the *Brady* case, a five to four decision of this Court, were thought to have even remote applicability to this case, we submit that a later unanimous opinion of this Court, *Tiller* v. *Atlantic Coast Line R. Co.*, 89 L. Ed. 403,* involves principles more nearly analogous. This also was a suit to recover from a railroad for negligently causing the death of an employee. As in this case, failure to give warning of a new or unusual practice was involved. In holding that the question was for the jury, this Court said:

*Not yet officially reported.

> ". . . The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. *We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars, without giving 'adequate warning of the movement.'*"

The evidence here was persuasive that the change from the standard container to the flimsy container involved hazards not presented in the use of the standard container; that the handling customarily, though not universally, accorded containers of nitro-cellulose in lacquer plants was entirely safe with the standard container and unsafe with the substituted container.

The curious insistence, lacking any force, save such as is gathered from Petitioner's constant repetition thereof, that Petitioner could not have anticipated the use of a concrete chute, because other people did not have such a chute, has been sufficiently disposed of.

The danger that gas would escape from this flimsy drum and that the drum would come in contact with some other hard substance that would produce a spark, because of the absence of the zinc covering, was

sufficient to charge Petitioner with responsibility for the ensuing calamity.

(2) In an attempt to give some semblance of support to the contention that this is a proper case for review on certiorari, it is stated, somewhat feebly, that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of the Court of Appeals of Kentucky, reliance, of course, being had on so much of Rule 38-(5)-(b) as authorizes a review on certiorari "where a Circuit Court of Appeals . . . has decided an important question of local law in a way probably in conflict with applicable local decisions."

There is no "important question" of local law involved. As this Court stated in the *Brady* case, "every case varies."

The Kentucky decisions referred to in Petitioner's brief (p. 25), with reference to foreseeability, announce no principle in conflict with the pronouncement of the Circuit Court of Appeals in this case (R. 252); nor of the Kentucky cases quoted *supra,* pp. 13-17.

A decision in this case certainly could not control the application of the principle of foreseeability as an element of negligence in the next case that may arise wherein a different factual situation is presented.

The second reason why the writ should issue in this case is, if possible, more flimsy than the first.

(3) It is said that the Court erred in excluding evidence as to the regulations of the Interstate Commerce Commission. Surely this Court is not prepared to review every case tried in a district court where one litigant contends that the trial court erred in the ex-

clusion or reception of evidence. The Circuit Court of Appeals did not hold that such regulations are not admissible in evidence *where relevant to the issues involved.* It merely held:

(a) That the evidence was not relevant to the issues in this case, and

(b) That if it were relevant the fact was amply proven and the error, if any, was not, therefore, prejudicial (R. 253):

> "The court below refused to admit in evidence regulations of the Interstate Commerce Commission authorizing the use of the light steel drums for the transportation of explosives, and this is assigned as error warranting reversal of the judgment. *It is difficult to perceive the materiality of this evidence since the charge of negligence is not based upon the use of containers inadequate for transporting nitro-cellulose.* The essential claim of negligence is based upon failure to warn the consignee of the danger in rough handling of the containers after they were unloaded. True, it is, that the excluded evidence might, in some measure, have diluted the fault of the appellant in the minds of the jury, unless carefully confined by instructions that the safe character of the drums for purposes of transportation necessarily did not establish their safety in other aspects, and if the evidence had been admitted we may not presume that it would not have been so confined. There are cases which hold that Interstate Commerce rules are for the benefit of railroad employees and the public rather than for the protection of shipper and consignee, who know the contents of a shipment and whether danger is inherent in its transit.

Davis v. A. F. Gossett & Sons, 118 S. E. (Ga.) 773, is illustrative of such cases. These aside, however, *we are not persuaded that the exclusion of the regulations resulted in prejudice.* The containers involved were repeatedly referred to in the evidence as I. C. C. 73-E. Whether or not the jury understood this reference to mean that they were authorized by the Interstate Commerce Commission, is unimportant since the testimony of Hunt, an inspector for the Bureau of Explosives of the Interstate Commerce Commission, made it quite clear that the container was authorized for purposes of transit as a single trip container. *The regulations would have added nothing to this evidence, and if there was error in their exclusion, it was not prejudicial.* Rule 61, Federal Rules of Civil Procedure."

(4) The fourth alleged reason why this is a proper case for review on certiorari is that other circuit courts of appeal have held the regulations in question to be admissible in evidence. The Circuit Court of Appeals in this case did not intimate that the regulations would not be admissible if relevant to the issue on trial. The cases relied upon by Petitioner involved losses in shipments where the regulations had been violated. Here the accident occurred after the shipment had terminated and the regulations had ceased to be applicable. However that may be, Petitioner got the full benefit of proving this regulation.

(5) It is urged that the questions involved are important to Petitioner and to manufacturers generally. We submit that the question in issue in this case is important only to the Respondent widow, to whom

$15,000 will mean a great deal as a partial substitute for the earning capacity of her husband which was destroyed. The case announces no general principle not already familiar. A case involving principles of less consequence to the general administration of the law, or a decision in which would be less likely to cut a pattern that would be controlling in other cases, can scarcely be imagined.

As we have observed before, the curious persistence of Petitioner, with its reiterated petitions for rehearing and for certiorari in this simple accident case, are explainable only on the ground that the Petitioner has a long purse and counsel who never tire. There is no other excuse for burdening this Court with this character of litigation.

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

J. VERSER CONNER,
Attorney for Respondent.

Emphasis throughout supplied.

(20)

FILED
MAR 31 1945
CHARLES ELMORE CROPLEY
CLERK

No. 1069.

Supreme Court of the United States

October Term, 1944.

E. I. duPONT deNEMOURS & COMPANY, - Petitioner,

versus

MINNIE L. WRIGHT, Administratrix of the Estate of WILLIAM T. WRIGHT, Deceased, - - - - - - - Respondent.

PETITIONER'S REPLY BRIEF.

CHARLES W. MILNER,
ROBERT T. McCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.

March 30, 1945.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1944.

No. 1069.

E. I. DUPONT DENEMOURS & COMPANY, - *Petitioner,*

v.

MINNIE L. WRIGHT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. WRIGHT, DECEASED, - - - - - - - - - *Respondent.*

PETITIONER'S REPLY BRIEF.

In the interest of accuracy attention is called to the following in respondent's brief:

I.

At page 6 it is stated:

> "The handling of this particular drum conformed to the practice which witnesses stated was usual and customary in lacquer manufacturing plants in Louisville and elsewhere; * * *"

This statement is contrary to the Record.

As stated by the court below:

> "* * * The drum which failed was then pushed across a concrete pavement and skidded down a concrete chute with a drop of 3½ feet in a length of 14½ feet."

Respondent can point to no evidence that anyone in the world, except consignee Jones-Dabney Company, ever skidded any kind of a drum of nitro-cellulose down a concrete ramp. And as correctly found by the court below, it was this unusual, unheard of act—the skidding of the drum down a concrete ramp—that caused the accident in question.

> "* * * The experts agreed that the sliding of the steel drum upon the rough concrete surface of the ramp, caused a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp. * * *"

There is no evidence in the Record that petitioner knew or suspected, or had any reason to know or suspect, that the consignee was guilty of such a practice.

II.

At page 6 it is stated:

> "* * * the skidding of drums of nitro-cellulose over concrete is essential in the operation of lacquer plants, and that the practice in this particular instance did not vary from that followed in plants generally; * * *"

The above is an overstatement. It is neither essential nor the general practice in the operation of lacquer plants, to skid drums of nitro-cellulose over concrete floors. There are five such plants in Louisville. Three of the five never permit drums of nitro-cellulose to be skidded on concrete floors (R. 77, 161, 163).

III.

At page 11 it is stated that there is no difference between skidding a drum over a concrete floor, a flat concrete surface, and skidding it down an inclined concrete surface.

There is the difference between day and night.

When a drum is skidded on a factory concrete floor there is nothing to loosen the removable top or head of the drum. The drum in question was skidded down the concrete ramp head first (R. 45) and as correctly found by the court below, and copied on page 2 above, the accident in question was caused by the head of the drum becoming loose on its way down the rough concrete surface of the ramp.

There is no evidence that the drum in question would have ignited if merely skidded on a level concrete floor instead of head first down a rough concrete ramp.

IV.

Each of the cases from the Kentucky Court of Appeals cited in respondent's brief bear out our contention that the decision of the court below was in conflict with applicable decisions of the highest State court. In each of them there is a prerequisite of "primary negligence" on the part of the defendant (petitioner) on account of "failure to exercise ordinary care" and a failure to foresee "something it ought to have foreseen."

Petitioner was guilty of no primary or other negligence in shipping the nitro-cellulose in a container that had been approved for that purpose by the Interstate Commerce Commission and that had never failed in twelve years of use, and it was not guilty of negligence in failing to foresee that a drum of nitro-cellulose would be skidded down the rough concrete surface of a ramp.

WHEREFORE it is respectfully submitted that the writ should be granted.

Respectfully submitted,

CHARLES W. MILNER,
ROBERT T. MCCRACKEN,
ABEL KLAW,
Attorneys for Petitioner.